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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 262

WILLIAM J. B. MYRE[illegible]

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

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No.

WILLIAM J. B. MYRES,

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vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

William J. B. Myres, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above cause on May 13, 1949, affirming the judgment of the United States District Court for the Western District of Missouri.

Opinions Below

The trial court filed no opinion. The opinion of the court of appeals (R. 1444) is reported in 174 F. 2d 329.

Jurisdiction

The judgment of the court of appeals sought to be reviewed was entered on May 13, 1949 (R. 1461). Petitioner filed a petition for rehearing which was denied on June 13,

1949 (R. 1525). Time for filing petition for certiorari was extended to August 12, 1949, by order of Mr. Justice Rutledge, filed July 8, 1949. The jurisdiction of this Court is invoked under Title 28, U. S. C. sec. 1254(1). See also Rule 37(b) of the Federal Rule of Criminal Procedure, promulgated by the Court February 8, 1946.

Questions Presented

1. Whether, when in a prosecution for willful attempt to defeat and evade the income tax it is made to appear that a taxpayer has refused or failed to comply with a revenue agent's informal letter requesting production of records to substantiate a detailed record of expenses, instruction to the jury that the taxpayer was required by law to comply with such request, and that such failure or refusal is evidence of the element of willfulness is reversible error.

2. Whether, in a prosecution for willful attempt to defeat and evade income tax, in violation of sec. 145(b), I. R. C., the jury may properly be permitted by instruction to base a finding of the essential element of willfulness contemplated by the statute upon evidence merely of failure or refusal by a taxpayer to produce records on request of internal revenue agents.

3. Whether the court below erred in holding that request for instruction, on defendant's theory of defense of good faith, as to asserted adequacy of petitioner's bookkeeping was properly denied because adequately covered by instruction omitting all mention of good faith and stating that if partnership kept track of income and expenses, their accounting was sufficient under the law, but if firm and members kept no books of account or records from which amount of net income of members of firm could be reasonably ascertained, that fact, with other circumstances, could be considered on the question of willfulness.

4. Whether the court below erred in approving the trial court's refusal to instruct, as requested, on petitioner's defensive theory of good faith in taking deduction of $8,000 in 1944, where the ground for such approval is merely that the jury was left free to believe that the defendant acted in good faith.

5. Whether in holding proper the trial court's instruction that petitioner had no right to deduct 100% of expenses claimed by him as a deduction unless he was required under his partnership agreement to bear all expenses of firm, and that there is a presumption in law that he bears only 50% which instruction erroneously confused 100% of law firm's expenses paid by petitioner with 100% of all law firm expenses and gave the presumption weight as evidence, the error of the court below deprived petitioner of his right to fair trial under the Fifth Amendment.

6. Whether the misconduct of the prosecuting attorney was a deviation from usual trial procedure so prejudicial to the defendant as to deprive him of a fair and impartial trial.

Statutes and Regulations Involved

The statutes and regulations involved are:

U.S.C., Title 26: Sec. 54(a).
Sec. 145(a).
Sec. 145(b).
Sec. 3614(a).
Sec. 3615(e).
Sec. 3631.
Sec. 3633.
Sec. 3654.

Regulations 111: Sec. 29.41-3.
Sec. 29.54-1.

They appear in the Appendix, pp. 55-57.

Statement

In August, 1947, an indictment in four counts was filed against petitioner in the United States District Court for the Southwestern Division of the Western District of Missouri, charging him with willful attempts to defeat and evade a large part of his income taxes for the calendar years 1941-1944, inclusive, by filing false and fraudulent returns for each of those years[1] (R. 1). Petitioner was found guilty on all counts and sentenced to imprisonment for a year and a day on each count, all to run concurrently; he was fined $500 on the first and third counts and $1,500 on the second and fourth counts (R. 29).

Petitioner's appeal was on a number of grounds, including errors in rulings on evidence, in refusal and giving of instructions to the jury, and in rulings on objections made to remarks of Government counsel to the jury so unfounded and inflammatory as to deprive him of a fair trial.

The opinion of the court of appeals overruled these contentions and entered judgment of affirmance accordingly (R. 1444-1461). The opinion fails adequately to state the facts upon which many of the asserted errors are based. Detailed references to the record are therefore made throughout.

The evidence tended to show that the petitioner in 1934 became associated in the practice of law at Monett, Missouri, with Mr. F. P. Sizer, who had practiced law there for 30 years and had a practice covering four states (R. 907-908), under the firm name of Sizer & Myres. The practice of Mr. Sizer and of the partnership consisted mainly of

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[1] Indictment was under 26 U.S.C. sec. 145(b): "* * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition, to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with costs of prosecution.

personal injury and wrongful death claims and extended over Arkansas, Kansas, Missouri, and Oklahoma (R. 908). The practice was large and successful. In at least three instances, the firm obtained important and favorable reversals in Federal Employees' Liability Act cases in this Court. *Duncan* v. *Thompson*, 315 U. S. 1 (R. 1069); *Jenkins* v. *Kurn*, 313 U. S. 256 (R. 1045); *Steeley* v. *Kurn*, 313 U. S. 545.

By January 1, 1941, petitioner, who had started out as a mere investigator (R. 907), had acquired a 40% interest in the firm's business, and on March 1, 1941, he was given a 50% interest effective as to all business to be taken into the office after that date (R. 921). Mr. Sizer, however, reserved his full 60% interest in all cases then in the office (R. 939, 941).

No formal records or books of account in the commercial sense were kept by the firm or by the petitioner prior to January 1, 1945, because of Sizer's fear of possible investigations, similar to those he had already experienced, addressed to professional conduct and contemplating possible disbarment (R. 544, 929). Sizer died December 30, 1944 (R. 909).

The Government's case in broad outline sought to show petitioner's taxable net income by bank records of deposits of drafts representing partnership receipts and analysis of bank Recordak copies of checks indicating partnership expenses. On cross-examination there was an abortive effort to make proof on the net worth theory.[2] It was con-

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[2] On cross-examination the Government attempted to show that petitioner's total expenditures were $33,700 in 1941 (R. 1157-1160), $54,957 in 1942 (R. 1167-1170), $20,508 in 1943 (R. 1173-1176), and $54,554 in 1944 (R. 1176-1178).

But on re-direct examination it was brought out that the Government's own evidence in its case in chief charged that in 1941 the partnership's net income was only $55,019.14 (Ex. 214, R. 633) and petitioner's only $22,490.76 (R. 827); that in 1942 partnership's net income was only

ceded that petitioner had no income from his brokerage accounts or any other source (R. 825, 840, 841, 1270).

The Government's case in pertinent substance was as follows:

A large number of witnesses, clients for whom petitioner had acted, identified drafts or checks payable to themselves and Sizer & Myres as having been received in settlement of their cases and testified as to the amount thereof paid them (R. 183-194, 207, 234, 251-451, 458-498, 516-630).

Revenue Agent Starr, who conducted the investigation,[3] prepared transcripts of the bank accounts (R. 551) for "Sizer & Myres" from its opening April 7, 1941, through December 29, 1944 (Ex. 208, 209; R. 553-557, 559-579). "William J. B. Myres" (Exs. 210, 211; R. 581-583, 587-617), and "William J. B. Myres, Trustee" January 1-April 12, 1941 (Ex. 212; R. 619-623). He set up case analysis sheets allocating to each case the settlement draft received and the checks in turn written to pay clients, with resultant gross income and the case expenses incident

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$32,924.30 (Ex. 215, R. 635) and petitioner's only $13,690.87 (R. 830); that in 1943 the partnership's net income was $22,093.80 (Ex. 216, R. 637) and petitioner's only $9,636.25 (R. 833); that in 1944 the partnership's was $44,665.68 (Ex. 217, R. 639) and petitioner's only $25,126.74 (R. 836). It was further brought out that petitioner had at least $25,000 in securities and accounts receivable at the beginning of 1941 (R. 1215-1217) and that amounts representing deposits and withdrawals in brokerage accounts passed through the bank accounts numerous times during the year (R. 1215). No mention of the theory of net worth or its expenditure variant was made in the argument or instructions.

[3] Special Agents Wyble and Judson also participated in the investigation but their testimony, insofar as is here pertinent, was confined principally to assertion that petitioner had in September 1945 (Judson, R. 531) and in December 1945 (Wyble, R. 236-237) told them that he had no books or records and that all canceled checks had been destroyed.

thereto (R. 629).[4] One such analysis was set up for each year (Ex. 214, R. 633; Ex. 215, R. 635; Ex. 216, R. 637; Ex. 217, R. 639). A third set of Starr's exhibits purported to show a breakdown for each year of checks drawn on the three accounts for office expenses including specified items of "miscellaneous" office expense (Ex. 224, R. 667-685; Ex. 225, R. 689-705; Ex. 226, R. 707-721; Ex. 227, R. 725-739). The total of all the office expense shown on breakdown sheets for each year was carried back as a total to the case analysis sheets for each year. All expense checks not identifiable by the agent with a particular case were included in "Miscellaneous expense" in the year in which drawn (R. 783, 785, 786) and, with the indicated office expense, total case expense and depreciation for the year, was deducted from gross income to show the supposed partnership net income (R. 633, 635, 637, 639). Agent Starr then merely testified, without exhibit or other showing of how allowance was made for 60-40 allocation applicable to many of the cases, that petitioner's share of the partnership net income for 1941 was a stated amount (R. 822). As to the other years, he stated other deductions and his conclusion as to the petitioner's taxable net income (R. 830, 833, 836).

Petitioner's accountants' computations showed a much smaller net income and tax liability for each year than did the Government and the indicated deficiencies were relatively trifling (R. 827, 830, 833, 836; 1322, 1328, 1337, 1338,

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[4] The same computations for each year included specified amounts for "miscellaneous income" which represented deposits in the bank accounts from sources of income the agents were unable to identify (R. 806). These were never identified as income, although testimony with respect thereto was admitted by the court only on the assumption that their source would be shown (R. 808).

1342, 1344, 1350). Tabulated, the results compare as follows (R. 1448, 1449):

	Government	Petitioner
1941		
Net Income	$22,490.76	$6,767.10
Tax	5,723.40	644.08
Deficiency		380.91
1942		
Net Income	13,690.87	2,009.27
Tax	3,502.16	134.47
Deficiency		127.76
1943		
Net Income	9,636.25	2,512.77
Tax	2,347.06	310.51
Deficiency		168.00
1944		
Net Income	25,126.74	5,879.35
Tax	10,373.58	1,230.01
Deficiency		814.73

The deficiencies indicated by petitioner's accountants, if accepted by the jury would have made conviction by the jury very improbable.

The principal reason for this difference arose from the fact that the petitioner's accountant witnesses included 100% of such of the partnership expenses as were paid out of Myres' personal accounts (R. 1318), instead of the 50% allowed by the Government (R. 877). This was by both courts below recognized as the main point of difference in the case (R. 1325, 1449).

The jury returned a verdict of guilty on all four counts (R. 12). The sentence (R. 29-30) was affirmed by the court of appeals which filed an opinion (R. 1444-1446) and entered judgment accordingly May 13, 1949 (R. 1461-1462).

Specifications of Error to Be Urged

The Court of Appeals erred:

(1) In holding that defendant's privilege against self-incrimination was in no way involved in this case.

(2) In failing to hold that the trial court erred in its instruction that a taxpayer is required by law to comply with a mere informal request by a revenue agent for records to substantiate deductions and that failure or refusal of the taxpayer to produce books or records upon informal request for inspection is a circumstance which may be considered in determining willfulness of the charge of willful attempt to evade the income tax.

(3) In failing to hold that mere evidence of failure to produce for inspection records in the taxpayer's possession is not alone sufficient to justify a finding of willfulness under Section 145(b) of the Internal Revenue Code.

(4) In failing to hold that the trial court erred in denying the petitioner's requested instruction on his theory of defense that if the jury found a described accounting system was used in good faith as adequate and suitable, lack of more elaborate system was immaterial and not an element of the crime.

(5) In failing to hold that the trial court erred in denying the petitioner's requested instruction, on his theory of defense, that the jury, in determining guilt or innocence, if it found petitioner in making a deduction of $8,000 from gross income for 1944 did so in good faith upon an honest belief that he was entitled so to do, should treat the item as properly deductible for 1944.

(6) In failing to hold that instruction in the face of evidence to the contrary, that petitioner was in law presumed to have agreed to share firm expenses equally, was error requiring reversal.

(7) In holding that the misconduct of the prosecuting attorney did not require reversal of the judgment.

Reasons for Granting the Writ

This case was tried in an atmosphere pervaded by insinuation and innuendo on the part of the United States Attorney directed to creating the impression in the minds of the jury that petitioner had been found guilty of embezzlement in Oklahoma and had cheated his dying partner. The prejudice resulting from this all too familiar practice of too zealous prosecutors was greatly aggravated by the refusal of the court even to submit to the jury by appropriate instruction the defensive theories of good faith in two pivotal motions. Furthermore, it is doubtful that the Government submitted even a *prima facie* case.

The evidence was evenly balanced and of doubtful adequacy.—To sustain its burden to prove that an income tax was owing over and above the amount returned, i.e., that petitioner had a greater net income (*O'Brien* v. *United States*, 51 F. 2d 193 (C. C. A. 7, 1931); *Gleckman* v. *United States*, 80 F. 2d 394, 399 (C. C. A. 8, 1935)) the Government merely determined the amount of gross income of the partnership after payment of the clients' portions from checks identified as settlement checks and then deducted expenses attributable thereto (R. 629; Ex. 214, R. 633; Ex. 215, R. 635; Ex. 216, R. 637; Ex. 217, R. 639). These were of two types: (1) Those paid out of the firm account or reimbursed out of the firm account, and (2) those paid out of Myres' personal accounts (infra, pp. 11-12, 13, 38, 40). There was no attempt to compute firm expenses paid out of Sizer's personal account except insofar as he was reimbursed therefor out of the firm account (R. 841). The Government's principal witness, agent Starr, testified as to the amount of petitioner's taxable net income for each year as computed by him (R. 827, 830, 833, 836) but did not disclose his mode of computing petitioner's net income other than to state that certain of the net fees after expenses, were divided on

a 60-40 basis, others on a 50-50 basis, but all expenses were allocated on a 50-50 basis (R. 877).

The flaws in the Government's case are plain:

The Government omitted expenses incurred in earlier years and deductible in the tax years in question.—Under the completed contract basis of accounting employed by petitioner, expenses incurred in prior years with respect to a particular case were all deductible from gross income in the year the case was settled (R. 1236, 1323). This was recognized as the law of the case by the court (R. 1324) and applied by petitioners' accountants in including expenses incurred in 1936-1940 (R. 1323). Government agents recognized this principle as applicable (R. 778) and if they happened by interview with clients to find any expense prior to 1940 they allowed it as expense when the case was settled (R. 788). But the agent Starr did not have Myres' cancelled checks before him in making his computations (R. 902) and the bank's Recordak copies went back only to December 1, 1940 (R. 456, 786).

Starr also testified that as Government witnesses testified in court to advancements received in prior years on cases settled in 1941 and later, he took notes but since he was not in Court all the time he didn't get all the testimony. Despite there being cases in which advances were different from his record, this had in no way affected his computation (R. 855-856).

In any event the Government agents had no way of ascertaining in any amount the expenses incurred prior to 1941 and attributable to cases *lost* and closed in 1941 or later (R. 920). As part of a contingent claim practice, expenses were incurred with respect to those (R. 963) and where no monies were paid by the client or the defendant in his case, there was no suggestion that petitioner was reimbursed in any way for the expense of fruitless investiga-

tions, most of which Myres conducted (R. 1138-1139) except for the inadequate firm reimbursements at the rate of 3¢ per mile (R. 1128, 1159). For 1941, of 177 cases closed, only 56 yielded a fee (R. 1163-1164), 121 did not (R. 886-891); In 1942, of 168 closed, only 35 yielded a fee (R. 1092), 133 did not (R. 891-897); In 1943, of 89 closed, only 29 yielded a fee (R. 1091-1092), 60 did not (R. 897-899). Thus, the Government concededly omitted consideration of deductible expenses in an appreciable amount (R. 1323) and the Court so stated for the record as to the 121 cases in 1941 (R. 885).

The Government admitted petitioner paid out 100% of the expenses in numerous cases, and failed to show that he was reimbursed so as to bear only 50% thereof.—The witness Starr recognized that Myres had paid out partnership expenses, in certain cases 100% (R. 877), but he purported to reconcile this with his allowance to Myres of only 50% of all expenses on the asserted ground that Myres deposited the majority of the settlement drafts in his personal accounts and retained enough, when he gave Sizer a check, to reimburse himself (R. 877). Starr's own exhibits refute this answer. Its basic premise fails as to more than one half the cases and much more than half the total of the amounts received.[5]

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[5] Starr's own exhibits (bank ledger transcripts for the three accounts, Ex. 208-212, R. 553-623) affirmatively show that of the 114 settlements itemized by him for the four years totalling $451,999.97 (Ex. 214-217, R. 633-639) 64 totalling $292,165.84, or approximately 2/3, were deposited in the Sizer & Myres account, not in Myres' personal account.

Starr's testimony, covering specifically 83 settlement drafts (R. 787-807) shows only that 27 went into Myres' personal account (R. 789-804) and that in only 5 instances did the amounts of the checks subsequently paid to Sizer even tend to indicate that Myres reimbursed himself for his expenses in the suggested manner (R. 799, 803). In the other 22, Sizer received more than half the net (R. 789-803).

Commentary on the reliability of purported expert summaries of accounting figures is superfluous.

Obviously, where a case was lost and there was no fee, Myres could not reimburse himself, as suggested by the revenue agent (R. 877) by depositing the gross fee in his personal account and, in paying Sizer his share, withholding enough to reimburse himself for expenses.

Thus, Starr's conclusion as to reimbursement of Myres (R. 877) stands conclusively rebutted by his exhibits as to more than half the cases. As to the others, where the checks did go into the Myres personal accounts, Starr's testimony cited in the second paragraph of footnote 5 refutes as to most of them, his own assertion that Myres reduced checks for Sizer's portion of the fees so as to reimburse himself.

The issue whether petitioner was entitled to deduct 50% or 100% of the expenses of the petitioner paid by him was recognized by both courts as the main point of difference in the case (R. 1325, 1349). In view of the Government's evidence to show that he had in fact been reimbursed, which was weak as to some of the cases and failed completely as to more than half, the presumption of law invoked by the trial court (R. 1419) became a decisive factor in the case.

The Government's case excluded from consideration partnership expenses paid by Sizer and necessarily includible under its theory.—Petitioner testified that under his agreement with Sizer each paid certain of the expenses out of his own bank account and as to cases settled, those usually offset each other (R. 959). If there was no reimbursement from the client, petitioner got none from Sizer (R. 959).

Petitioner computed his share of the gross partnership income and deducted 50% of expenses paid from partnership account and 100% of expense paid from his own account (R. 1124, 1126-7, 1131). The Government purported

to compute partnership net income and petitioner's share thereof, and in doing so the Government accountant admittedly allowed petitioner only 50% of all the partnership expenses (R. 857). But even in computing these expenses, Sizer's payments from his personal account for the firm, if not affirmatively shown to have been reimbursed from the firm account, were omitted from consideration by the Government's witness (R. 841). Indeed, the Agent Starr testified he never saw any of Sizer's checks[6] (R. 841). Thus, petitioner was deprived of the benefit as a deduction of half of the total of such unincluded expense disbursements by Sizer to which he was entitled under the Government's theory of equal sharing of expenses with reimbursement to each partner. The Government's omission to give any consideration to Sizer's unreimbursed expenses, is peculiarly significant in view of the fact that it had admittedly made an examination as to Sizer's returns (R. 849).

The Government at no time attempted to explain how net income of the partnership could properly be computed when it had failed to take into consideration the deductions on account of the expenses disbursed by the other partner, and had shifted the accounting basis and ignored the expenses

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[6] He testified that the expenses disbursed by Sizer for which he allowed deduction as expense were those shown by reimbursing checks $646.86 in 1941 (R. 685, 849) and $500. in 1944 (R. 739, 851). Nothing was reimbursed for 1942 or 1943 (R. 849-850, 851). The only other allowance for expenses paid by Sizer are some small forced items credited to Sizer or cash for stenographer salaries $250. and $75. in 1941 (R. 685, 878, 879); $240. in 1942 (R. 705); $230. in 1943 (R. 721).

This failure of the Government to include consideration of Sizer's offsetting unreimbursed expenses was further shown by positive evidence of 14 Crabtree case checks drawn by Sizer in 1940 and 1941 (R. 841-846). Government witness Starr admitted these were not in his computations (R. 841, 842), and later said that they must have been included in reimbursement checks of the firm to Sizer (R. 843-846). But the Government's own Exhibits 215 and 216 showed the Crabtree settlements took place in 1942 and 1943 (R. 635, 637) and case settlement was the only time at which expenses would be settled (R. 958). During these two years, Starr gave Sizer no credit for any expense (R. 849-850, 851.).

of prior years deductible under the completed contract basis. *In re Harrington*, 1 F. 2d 749 (W. D. Mo. 1924).

Because of the obvious omission to include all partnership expenses in computing deductions, it appears doubtful that the Government presented a *prima facie* case for consideration by the jury even under its own theory.

Against this background, the plain errors of law of the trial court were so obviously prejudicial as to require granting of a new trial.

1. INSTRUCTION OF THE TRIAL COURT THAT PETITIONER, UPON INFORMAL REQUEST BY INTERNAL REVENUE AGENTS, WAS REQUIRED BY LAW TO PRODUCE BOOKS OF ACCOUNT OR RECORDS FOR INSPECTION AND THAT FAILURE SO TO DO MIGHT BE CONSIDERED AS EVIDENCE OF WILLFULNESS, WAS ERROR IN LAW AND WRONGFULLY SUBJECTED PETITIONER TO PENALTY WITHOUT A HEARING—Petitioner testified that he had at all times been willing to cooperate with the agents in every way he could (R. 1183). On his cross-examination, the Government brought out that under date of September 25, 1944, petitioner received a written request for retained copies of 1942 and 1943 returns, a detailed record of his expenses in connection with the firm and records to substantiate the same (Govt. Ex. 233, R. 1144).[7] No summons or subpoena was issued (R. 245).

Petitioner accordingly sent detailed statement of his expenses for the law firm but admittedly failed to comply with the request for substantiating records because he would have had to send his files (R. 1146).

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[7] The pertinent portion of the letter read (R. 1144):

"Since you were a member of the Sizer & Myres law firm, it is requested that you also submit a detailed record of the expenses incurred by you for each of the above years in connection with that firm, together with records to substantiate same."

It was apparently to this failure to comply with specific written request and the further fact that petitioner did not disclose his case files, checks, check stubs and other memoranda to the revenue agents [8] that the trial court addressed its instruction here questioned (R. 1424):

> "If a taxpayer does keep books of account or records from which his net income may be ascertained, then regardless of the form in which they are kept, *the law requires* him to produce the same and make them available at all reasonable times for inspection by Internal Revenue officers of the Government, so long as the contents thereof may be material in the administration of any Internal Revenue law enacted by Congress. The failure or refusal of a taxpayer having such books and records in his possession or under his control, revealing his net income, to produce the same for inspection by Internal Revenue officers of the Government, when requested so to do, is likewise a circumstance which the jury may consider in determining the willfulness with which a taxpayer acts." (Emphasis supplied)

Included in petitioner's objections to this instruction was the point (R. 1428):

> "He was not *legally bound* to give any evidence against himself, either by means of his records or otherwise." (Emphasis supplied)

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[8] At the trial, the Government witnesses testified that on three different occasions, petitioner informed them he had no canceled checks, check stubs or files that would serve to establish net income (R. 531, 543-544, 816). In the first and only statement by petitioner taken under oath, however, (and this was taken after the other alleged statements) it appears that no request for checks, check stubs or files was then made (R. 919-941); a Government witness so admitted (R. 541) and Government counsel so conceded (R. 1399). In any event, the instruction here complained of does not refer to any concealment or misrepresentation.

Petitioner had also made the same point in the trial court by his requested but refused Instruction No. 14 which included direction that:

> "• • • defendant was not *required by law* to cooperate with the investigating agents of the Revenue Department by furnishing them with information and data • • •" (R. 1437).

In the court of appeals he made the same contention. That court, however, failed to perceive the full breadth of the point and merely ruled that the privilege against self-incrimination had been waived by his taking the stand and testifying as to his willingness to cooperate (R. 1457).

In his petition for rehearing, petitioner again urged the point in a number of ways (R. 1464-1472) particularly stating (R. 1469-1470):

> "The question is not whether appellant was willing or unwilling to furnish his records to the government agents; rather the question is, was he *obliged* by the law to do it?"

The question, therefore, is not whether the privilege against self-incrimination was waived at the trial by accused's testifying; it is not whether failure to supply records on request could properly be considered by the jury on the question of willfulness.

The question here is whether, in considering such failure or refusal to supply records as evidence of willfulness, the jury may evaluate such refusal on the assumption that it was a breach of duty imposed by law or was merely the exercise of a choice freely accorded to the accused because he was at that time, as a matter of law, free to make it.

Petitioner does not contend that the jury might not properly consider his refusal as part of conduct. That was opened by his waiver of the privilege. But the prejudicial

evidential weight attached to that conduct is obviously gravely increased by the significance the jury would naturally attach to the court's instruction that such refusal was, at the time it occurred, in violation of positive law.

It is petitioner's contention that the applicable statute and regulation in the light of the Fifth Amendment have never been construed to impose a legal duty to deliver records except upon legal process.

a. *Petitioner was not required by law to produce his records and make them available at the request of the revenue agents.*—Sec. 54(a) of the Internal Revenue Code, requiring the taxpayer to keep records and to comply with regulations, and the regulations requiring the keeping of records and their availability for inspection (Regs. 111, sec. 29.54-1) must be construed with the safeguards laid down by Congress in the same code establishing the conditions under which access to records may be obtained.

Sec. 3614(a) confers general power on the Commissioner, through his subordinates, to inspect any books or papers bearing upon the matters required to be included in the return. But this right of inspection has never before been construed to impose a legal duty to comply with an informal general demand for papers. On the contrary, Congress has surrounded the authority of the Commissioner with safeguards essential to protection of the right to privacy and against unconstitutional search and seizure. Congress has vested no authority in the Commissioner to compel compliance with the statute; indeed, it could not. *Interstate Commerce Comm.* v. *Brimson*, 154 U. S. 447, 485. In conferring jurisdiction on the courts to enforce the right to inspection, it set up formal summons as a condition precedent. Sec. 3633(a) provides:

> "If any person is summoned under the Internal Revenue laws to appear, to testify or to produce books,

papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data."

Thus, Congress has specifically provided, by the requirement of formal summons, consonant with procedural due process, the same protection against unreasonable search and seizure and against self-incrimination that is afforded by the requirement of certainty in search warrants and the benefit of magisterial, rather than administrative, determination of permissibility of, and limitations on, the demand. Cf. *Interstate Commerce Comm.* v. *Baird*, 194 U. S. 25, 45; *In re Andrews' Tax Liability*, 18 F. Supp. 804, 807.

The general power of examination or inspection conferred on the Commissioner and his subordinates by sec. 3614(a) is in effect, therefore, a power of inspection at the taxpayer's place of business, without summons or subpoena, to be exercised *only on his consent*, a requirement much less burdensome than the requirement under the summons or subpoena power to make selection of a great number of books and papers and produce them at other places. *Cudahy Packing Company* v. *Holland*, 315 U. S. 357, 364. *Associated Press* v. *Herrick*, 13 F. Supp. 897, 899 (S. D. N. Y. 1936). Administrative agencies have no power to secure documents, even though required by law, through the process of a general search and seizure. Where, as here, consent is not given, demand expressed in lawful process—formal summons or subpoena—must be made in order that the taxpayer may enjoy the protection of the limitations which the law imposes with respect to lawful process. *Wilson* v. *United States*, 221 U. S. 361, 382; *Ess Gee Company* v. *United States*, 262 U. S. 151, 156; *Fleming* v. *Montgomery Ward & Co.*, 114 F. 2d 384, 389 (C. C. A.

7, 1940), cert. denied 311 U. S. 690; *United States* v. *Shapiro*, 159 F. 2d 890 (C. C. A. 2, 1947) aff'd 335 U. S. 1; *Bowles* v. *Beatrice Creamery Company*, 146 F. 2d 774, 779 (C. C. A. 10, 1944). *Precision Castings Co.* v. *Boland*, 13 F. Supp. 877, 883 (W. D. N. Y. 1936), affirmed 85 F. 2d 15 (C. C. A. 2, 1936). Such process must state the purpose of the inquiry, must particularly describe the books and papers so that they can be readily identified, and must limit its requirements to books and papers that are relevant to the inquiry. *Federal Trade Comm.* v. *American Tobacco Co.*, 264 U. S. 298, 306-307.

The so-called summons, issuable under the authority of the Commissioner of Internal Revenue, is the equivalent of an administrative subpoena. See Report of Attorney General's Committee on Administrative Procedure, App'x K, pp. 414, 434 (S. Doc. No. 8, 77th Cong., 1st sess.).

Conceding arguendo, that the papers requested might possibly be regarded as public documents or that there is a general right to inspection, still the right of privacy remained. *Davis* v. *United States*, 328 U. S. 582, 593. As said by Mr. Justice Frankfurter, dissenting, in *Davis* v. *United States, supra*, p. 596:

> "Merely because there may be the duty to make documents available for litigation does not mean that police officers may forcibly or fraudulently obtain them. This protection of the right to be let alone except under responsible judicial compulsion is precisely what the Fourth Amendment meant to express and to safeguard. • • • [p. 603] The difference between demanding documents without legal process and seizing them on the basis of such process, is the difference between protection of civil liberties and their invasion."

These statements were not questioned by the majority in the *Davis* case. *United States* v. *Shapiro*, 159 F. 2d 890, 893 (C. C. A. 3, 1947).

It is not necessary here directly to determine whether the requested records, although "required" (Regs. 111, sec. 29.54-1), were or were not public records not within the privilege against self-incrimination. Cf. *Shapiro* v. *United States*, 335 U. S. 1. The only direct authority is that they are within the privilege. *Internal Revenue Agent* v. *Sullivan*, 287 Fed. 138 (W. D. N. Y. 1923). See Immunity from Subpoena of Taxpayer's Records, 27 Taxes (July, 1949) 639.

Decisive here are the requirement of the statute and the uniform course of decision that legal duty to produce records, such as were here requested, can be imposed only by the compulsion of legal process, not by the mere informal demand of administrative officers. Certainly, under the protection of the Fifth Amendment, as well as the Fourth, petitioner was entitled to legal process in order that he might at least test the question of the validity of the demand, including the issue whether these are public records.

b. *The court's instruction deprived petitioner of his constitutional right to hearing as part of due process.*— The informal demand did not give rise to a justiciable controversy (*Jamestown Veneer & Plywood Corp* v. *Boland*, 15 F. Supp. 28, 30 (W. D. N. Y. 1936)) so that petitioner might obtain a hearing on his objections to furnishing the requested papers either by motion to quash (*In re Upham's Income Tax*, 18 F. Supp. 737 (S. D. N. Y. 1937)) or enjoin. (*Federal Trade Commission* v. *Miller's National Federation*, 23 F. 2d 968 (App. D. C. 1928); cf. *Federal Trade Comm.* v. *Claire Furnace Co.*, 274 U. S. 160. See Handler, *The Constitutionality of Investigations by the Federal Trade Commission* (1928), 28 Col. L. Rev. 708, 719, 720). Certainly, upon issuance of a formal summons with duces tecum clause, petitioner's right to hearing, as part of due process, would have been preserved in court proceedings to enforce com-

pliance therewith under I. R. C., sec. 3615(e) or sec. 3633 (*Murdock* v. *United States*, 284 U. S. 141, 148; *United States* v. *United Distillers Products Corp.*, 64 F. Supp. 978, aff'd 156 F. 2d 872, 874 (C. C. A. 2, 1946); *Caplis* v. *Helvering*, 4 F. Supp. 181 (E. D. N. Y. 1933)) or in proceedings to impose the criminal sanction under sec. 145(a) of the Internal Revenue Code had he chosen to risk the penalty to test the privilege. *United States* v. *Murdock*, 290 U. S. 389, 396; *California* v. *Latimer*, 305 U. S. 255, 261; *Federal Power Comm'n* v. *Metropolitan Edison Company*, 304 U. S. 375, 387.

Here, by instruction of the trial court, his duty to furnish the papers is concluded against him as a matter of law without a hearing.

c. *Government counsel conceded that the law did not require petitioner to make his records available for inspection at the simple request of the agents.*—So clear is the law on this point, that twice in his closing argument, United States Attorney Wear stated to the jury that petitioner did not have to give Agent Starr his records when he asked for them (R. 1398, 1399).

d. *No assertion of constitutional privilege against self-incrimination was necessary.*—The privilege against self-incrimination is a privilege against testimonial compulsion extending to documents as well as to oral testimony. *Boyd* v. *United States*, 116 U. S. 616, 633; *United States* v. *White*, 322 U. S. 694, 699. But here, because there was no legal process, petitioner was under no compulsion against which to assert the privilege. Since he could not claim it, he could not, by failing so to do, be deemed to have waived it. *United States* v. *Kimball*, 117 Fed. 156, 163 (S. D. N. Y. 1902).

e. *The opinion of the court below, upholding the trial court's instruction as to legal duty, sweeps away any semblance of protection against self-incrimination under the Fifth Amendment.*—If the rule laid down by the trial court is the law, then the citizen is as helpless in the hands of any investigator for any Government department as was the British citizen under the general warrant. If, at mere informal request of any Government agent, he surrenders his papers, or consents to a general perusal of all his papers, he waives any constitutional right. *Nicola* v. *United States*, 72 F. 2d 780, 785; *United States* v. *Hoyt*, 53 F. 2d 881, 885; *Bowles* v. *Beatrice Creamery Company, supra.* On the other hand, under the ruling of the court below, if, even in the absence of legal process, he refuses, as here, to give his consent, he immediately subjects himself to the peril that without hearing on the issue of legal duty a jury in considering the question of willfulness will evaluate such conduct under an instruction that his refusal was in violation of positive law.

The recent decisions of this court have gone far to limit the protection of the Fourth and Fifth Amendments, but this decision bites much deeper. If it is the law, the impact of tax investigations on such a large portion of the population justifies its authoritative statement by this court. If it is not the law, the prejudice of the error manifestly requires reversal of petitioner's conviction.

2. The Decision of the Court Below Is in Conflict with the Decision of This Court in Spies v. United States, 317 U. S. 492.—The trial court instructed (R. 1425):

> "The failure or refusal of a taxpayer having such books and records in his possession or under his control, revealing his net income, to produce the same for inspection by internal revenue officers of the Government, when requested so to do, is likewise a cir-

> cumstance which the jury may consider in determining the willfulness with which a taxpayer acts."[9]

Exception to this instruction was taken on the ground, inter alia, that it was error to instruct that such failure to exhibit books and records was any evidence of willfulness (R. 1426). Both in the brief in the court of appeals and in petition for rehearing (R. 1473) it was pointed out that proof of failure to produce books and records or to furnish information is merely evidence to sustain conviction of one of the misdemeanors denounced by I.R.C., sec. 145(a).

In *Spies* v. *United States,* 317 U. S. 492, this court held that proof of willful omission to make a return or to pay a tax, (like willful failure to keep records or supply information, made misdemeanors by sec. 145(a) of the Internal Revenue Code does not establish violation of sec. 145(b) punishing one who

> "willfully attempts in any manner to evade or defeat any tax imposed."

This Court said (p. 499):

> "Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but positive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony."

Under this holding, it is clear as held in *Cave* v. *United States,* 159 F. 2d 464, 466, 467 (C. C. A. 8, 1947) (cited by the court below in sustaining the sufficiency of the evi-

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[9] It is to be noted that the charge is not that evidence of failure or refusal to produce books and records is a circumstance which the jury could consider *in connection with evidence of other affirmative acts;* rather the instruction is that evidence of such failure standing alone is adequate to support finding of willfulness.

dence) an indictment is adequate under sec. 145(b) if it charges attempt to defeat and evade the tax "by the positive act of willfully filing a false and fraudulent return." Of that there is no question.

A different issue is here presented. The decision below overlooks that the question here is what evidence is necessary to sustain the charge of "willfully" filing a false return. Here the trial court instructed that a finding of the requisite "willfulness" in the felony charge could be inferred by the jury from the "willful but passive neglect" to furnish information which has been held to constitute the lesser offense.

The court of appeals thus overlooks that, regardless of the sufficiency of the indictment, or its own view of the sufficiency of the evidence thereunder, the defendant by the express holding of the *Spies* case was

> "*entitled to a charge* which will point out the necessity for such an inference of willful attempt to defeat or evade the tax from some proof in the case other than that necessary to make out the misdemeanors." (Emphasis supplied.)

The conflict with the decision of this court in the *Spies* case is clear.

It is axiomatic that where the jury, because of erroneous instruction, may have founded its verdict on inferences not permissible in law, then the defendant is entitled to a new trial by a jury properly instructed.

> "* * * the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts" (*Bollenbach* v. *United States*, 326 U. S. 607, 614.)

This conflict with the decision of this court requires reversal in order that petitioner may be tried before a

jury rightly informed of the bases from which inference of willfulness—the single ultimate issue in the case—may properly be drawn.

3. PETITIONER'S RIGHT TO FAIR TRIAL WAS DESTROYED BY REFUSAL OF THE TRIAL COURT TO INSTRUCT THE JURY ON THEORIES OF THE DEFENSE PRESENTED BY THE EVIDENCE AND RELATING TO PIVOTAL ISSUES IN THE CASE.—Conflict with decisions of this court and other circuit courts is clear. A recognized essential of trial by jury is the right of defendant in a criminal case to have clearly stated to the jury each distinct and important theory of the defense supported by evidence. And where, as here, the court's attention is particularly directed thereto, it is reversible error for the court to refuse to make any charge on such theory. *United States* v. *Murdock,* 290 U. S. 389, 396; *Bird* v. *United States,* 180 U. S. 356; *Jones* v. *United States,* 164 F. 2d 398, 400 (C. C. A. 5 1947); *Hargrove* v. *United States,* 67 F. 2d 820, 823 (C. C. A. 5, 1933); *Calderon* v. *United States,* 279 Fed. 556 (C. C. A. 5, 1922); *Hendrey* v. *United States,* 233 Fed 5, 18 (C. C. A. 6, 1916).

Where the crime alleged includes "willfulness", bad faith is an essential element. *Felton* v. *United States,* 96 U. S. 699, 702; *Murdock* v. *United States,* 290 U. S. 389, 396.

By refusal of requested instructions petitioner was deprived of the benefit of this rule with respect to substantial evidence presented on two issues of primary importance to the defense in this case:

1. Whether petitioner acted in good faith in reducing reported gross income for 1944 by the amount of $8,000.

2. Whether the system followed in keeping account of receipts and disbursements and in making up income tax returns was used by petitioner in good faith.

The opinion of the court of appeals, in sustaining the instructions given by the trial court, on these two points (R. 1454-1455, 1455-1456) omits any mention of the question of good faith.

a. *The court below erred in failing to hold reversible errors the trial court's refusal to submit to the jury the question whether the petitioner's omission of $8,000 from reported income in 1944 was in good faith, as he contended, and its further instruction, contrary to the fact, that petitioner was continuing to claim the same item as a deduction in both years.*—The evidence required submission of the defendant's requested Instruction No. 16 (R. 1438) and afforded no support for the instruction given by the trial court. The record shows that Cuneo, defendant's accountant witness, an expert (R. 1312-1314) who came into the case about two weeks before the trial (R. 1316), testified that in his reconstruction of taxable income of petitioner for 1944 (R. 1351); (Def. Ex. 3011) he allowed petitioner an $8,000 deduction as a business deduction for cost of cases purchased in December 1944 from Sizer (R. 1346-1347). Myres had testified that he had on December 20, 1944, purchased from Sizer by oral agreement his interest in cases pending and not yet disposed of (R. 1137), that he offered to pay the purchase price the same day but Sizer refused it (R. 1137), and the payments of $2,000 and $8,000 were made to Sizer's executor about January 5-12, 1945 (R. 1138). Myres also testified he charged off the $8,000 in computing his 1944 income tax, believing he had the right to make the deduction [10] (R. 1138, 1210-1211).

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[10] Correlation of constructive payment with the doctrine of constructive receipt has been urged by respectable authority (Paul & Mertens, Law of Federal Income Taxation, 1939 Supp. § 32A.24; dissent of Arundell and Turner, JJ. in *Vander Poel, Francis & Co.*, 8 T.C. 407, 413.

In preparing his 1945 return with the help of Lang, an attorney and accountant, he set up, on the latter's advice, the $8,000 item as a deduction because otherwise he would lose it altogether if it were disallowed for 1944, as Lang thought it might be (R. 1210-1211).

In addition to Cuneo's testimony supporting deductibility in 1944 (R. 1346-1347) Lang, who was also an attorney (R. 1232), stated that there were cases both ways (R. 1305).

The evidence thus gave ample support to the defense theory that Myres had omitted the item in 1944 in good faith. Accordingly, petitioner requested but the trial court refused instruction that if defendant had made such deduction in good faith in an honest belief that he was entitled to take such deduction for said year "then the jury, in determining his guilt or innocence, should treat it as properly deductible (Requested Instruction No. 16; R. 1438).

Contrary to the uncontradicted evidence, the trial court said (R. 1422):

> "The evidence, as it stands before us, is that defendant continues to claim such item in both years."

There is no support in the record for this statement. It could only cause the jury utterly to disregard the plain testimony of Myres, the petitioner, that he recognized the item was deductible only in one of the two years and that the 1945 deduction was taken only to insure tax benefit in one year and that he was ready to pay the money over on account of the tax for the year in which the item should be disallowed (R. 1211). Lang also testified that in including the item in the 1945 return it was not his purpose to take the same deduction in both years but only for one year (R. 1233-1234).

Nevertheless, the court, denying the requested instruction, made this transaction thus completely explained the

basis for a most damaging inference of guilt of willfulness. He said (R. 1481):

> "Such item not being paid for in 1944, regardless of any accounting theory explained to you, such item was not deductible in 1944 as an item of business expense.
>
> "The evidence, as it stands before you, is that defendant continues to claim such item in both years. * * * He cannot claim such item in two years and deduct the same in both years. Contradictory action taken by the defendant, together with all the other facts and circumstances shown in the evidence, may be considered by you when you come to determine the willfulness with which the defendant acted, if any."

Objection calling attention to the error in the instruction was promptly taken (R. 1427).

The result of course was: (1) Deprivation of the right to have the jury consider the question of defendant's good faith, one of the requirements essential if petitioner was to have even the semblance of a fair trial; (2) Complete misstatement of petitioner's position on an issue thus made crucial.[11] Furthermore, there is well recognized authority for the taking of the deduction in 1945 when he thought it possible that the deduction might not be allowed for 1944. 2 Mertens, Law of Federal Income Taxation, par. 14.06, p. 414, note 26; Regs. 111, sec. 29.3801(b)-2; Rabkin & Johnson, Federal Income, Gift and Estate Taxation, p. 4129, par. 3.

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[11] The instructions of the court as a whole permitted the jury to find the vital element of willfulness only in: (1) this alleged taking of a double deduction (R. 1422); (2) the taking of a deduction of 100% of firm expenses paid out of petitioner's own bank account (R. 1420); (3) the alleged failure to keep adequate records (R. 1424); (4) failure or refusal to produce books and records for inspection (R. 1425).

As held in *Rogers Recreation Company of Conn.* v. *Commission*, 103 F. 2d 780 (C. C. A. 2, 1939), where a similar protective double deduction had been taken (p. 783):

> "There is nothing fraudulent in attempting to reduce taxes by claiming a deduction honestly but erroneously believed to be legally permissible. * * * The taxpayer's officer, Rogers, acted on the advice of an accountant who had always prepared the company's income tax returns."

It is clear that there was substantial evidence to support petitioner's defensive theory that he omitted the $8,000 from gross income in good faith. The instruction was requested (R. 1438). Error in its refusal was asserted and argued in the brief in the court below and in petition for rehearing (R. 1479). Cynically enough, the court of appeals, of this refusal merely said (R. 1456):

> "The jury was free to believe that the defendant acted in good faith in deducting in 1944 the $8,000 which he had not expended in that year."

Exactly so. But the defendant was entitled to have the trial court tell the jury the legal effect of such belief. The cases cited, *supra*, p. 26, make plain that this omission was reversible error.

The substitute instruction misrepresented petitioner's evidence and contention.—The trial court instructed—contrary to the plain and uncontradicted testimony of defendant and his accountants—that defendant was continuing to claim the item in both years, and that petitioner, in following the accountant's advice and taking the deduction also in 1945 solely to insure allowance for one year, had thereby evidenced willfulness in filing the 1944 return (R. 1422). On this the court based the instruction that contradictory action taken by the defendant could be considered evidence of will-

fulness. Since the trial court had already, in complete misrepresentation of the evidence, told the jury that the taking of the deduction in both years in the returns were contradictory acts, this could only be regarded by the jury as a specific direction to find the element of willfulness.

When regard is had for the real facts in the record, the error is plain. It is well established that, despite the freedom of the judge in Federal court to comment on the evidence, such unwarranted distortion of the facts in the evidence is never permissible. In *Quercia* v. *United States*, 289 U. S. 466, this court said (p. 470):

> He [the trial court] may analyze and dissect the evidence, but *he may not either distort it or add to it.* This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to *mislead*, and especially that it should not be onesided;' that '*deductions and theories not warranted by the evidence should be studiously avoided.*'" (Emphasis supplied.)

The same restriction on the court is applied in *United States* v. *Breitling*, 20 How. 252; *Dolan* v. *United States*, 123 Fed. 52 (C. C. A. 9, 1903); *Pincolini* v. *United States*, 295 Fed. 468 (C. C. A. 9, 1924). This flagrant disregard of established rules for protection of the defendant requires correction by this court.

b. *Petitioner was wrongly deprived of instructions on defensive theory of good faith in maintaining system for keeping track of gross income and deductions and in its use for income tax returns.*—Petitioner requested an instruction, No. 3 (R. 1432), based on the facts in evidence and on Regs. 111, sec. 29.41-3, infra, Appx., p. 57, and stating that if the jury found that Myres and Sizer used a described system of keeping track of receipts and disbursements in making up their income tax returns and that the system *was*

used in good faith as adequate and suitable for their purposes, then the question of what books and records were kept during the years in question was immaterial and verdict of guilty cannot be based on failure to establish a more elaborate system (R. 1432-1433). This was refused (R. 1432-1433).

In lieu, the court said (R. 1424):

> "If you find and believe from the evidence that the firm of Sizer & Myres kept track of the income of such firm and the ordinary expenses incurred by them in the conduct of their law business so that the net amount of income of each member of said firm could reasonably and fairly be determined therefrom, then the accounting method so employed by them was sufficient under the law and, regardless of the manner or form in which they kept track of such income, is immaterial."

This was insufficient as a matter of law. The evidence in support of defendant's good faith in maintaining his system and in using it to prepare his income tax returns was ample.[12] The instruction deprived defendant of his right to have the jury pass upon question of his good faith in maintaining the system he used as requested in the instruction for which this was a purported but inadequate sub-

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[12] The Record showed that although Sizer prohibited keeping of books, (R. 544, 928, 929), when each case was closed a sheet listing its expenses was placed in the case file (R. 516). Petitioner kept and preserved all checks drawn on his private bank accounts and on the partnership bank account and he produced every one in court (R. 952, 1065, 1095, 1097, 1269), in practically all instances identifiable as to case or expense segregation (R. 1310). There was also a file of bills of the office and current expenses such as postage, telephone, etc. (R. 515, 1124). All these were used by petitioner in preparing his income tax returns (R. 1125-1132).

stitute.[13] *United States* v. *Murdock*, 290 U. S. 389, 396; and other cases cited, *supra*, p. 26.

Any possibility of adequacy of the substitute, was entirely dissipated by the next sentence in the instruction (R. 1424):

> "However, if you find and believe from the evidence that said firm and the members thereof kept no book of account or records from which the net amount of the income of the members of such firm could be reasonably ascertained, then that fact, as established by the evidence, is a matter which you should take into consideration, together with the other facts and circumstances shown in evidence, when you come to consider the willfulness with which defendant is here charged."

This sentence served, of course, to modify the prior sentence of the instruction and to wipe out the clause "regardless of the manner or form in which they kept track of such income" as it there appeared. It substituted the requirement that any method of keeping track of income no matter how adequate in result must, nevertheless, include the keeping of "books of account or records" or such system would, as a matter of law, be inadequate and constitute a permissible basis for inference of willfulness (R. 1493).

The court of appeals noted a fact which is apparent from the record as a whole—that throughout the trial "records" was used as referring to formal books recording financial transactions. For in ruling on this point it said (R. 1455):

> "The court instructed the jury, in substance, that the manner and form in which the firm kept track of income was immaterial if the amount of income of its members could reasonably be ascertained from its system of accounting, but that, if the firm and its members kept no *books* from which their income could be

[13] In denying petitioner's instruction, the court also effectively took from the jury consideration of the fact that petitioner had kept cancelled checks, check stubs and case files, since the court carefully omitted any reference to these documents in the substituted instruction.

> ascertained, that fact should be taken into consideration, with other facts and circumstances shown by the evidence, in determining the issue of the willfulness with which the defendant was charged."

Just as in the trial court's instruction, the second part of the appellate court's paraphrase asserts that the defendant must have kept "books" or risk a finding of willfulness. The antithesis destroys any benefit the petitioner might otherwise have obtained from the first part. Yet the court of appeals merely ruled (R. 1455):

> "In our opinion, the defendant was not entitled to a more favorable instruction in regard to his or the firm's keeping of financial records."

The court below thus affirmed the refusal of the trial court to submit to the jury the question whether petitioner maintained the system he used in good faith as adequate for his purposes. It erred as a matter of law in holding that the regulations under the statute do require anything more than the preservation of permanent data sufficient to compute net income regardless of whether such data may qualify as "books of account or records" in the commercial sense in which that phrase was used in this case. *Mary W. Leach*, 16 B.T.A. 781, 783 affirmed 50 Fed. 371 (C. C. A. 1, 1931); *H. L. Scales*, 10 B.T.A. 1024, 1027 (1928). Were this not so, and if the word "records" as used in sec. 145(a) and Regs. 111, sec. 29.54-1 were similarly held to impose the duty to keep the data in such a formal manner, the statute and regulation thereunder would be subject to grave question for vaguity and indefiniteness. *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 89; Cf. *Lanzetta* v. *New Jersey*, 306 U. S. 451.

The fundamental error, however, with respect to both issues was the refusal to instruct the jury on the law ap-

plicable to the defense theory of good faith. As was held in *Sparf and Hanson* v. *United States,* 156 U. S. 51, 74:

> "It is the duty of the court to instruct the jury as to the law and it is the duty of the jury to follow the law as it is laid down by the court. This is the right of every citizen, and it is his only protection. • • • Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land, and not by the law as a jury may understand it, or choose, from wantonness or ignorance or accidental mistake, to interpret it."

4. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT IN APPROVING THE INSTRUCTION TO THE JURY, IN THE FACE OF EVIDENCE TO THE CONTRARY, THAT THERE WAS A PRESUMPTION IN LAW THAT PETITIONER WAS REQUIRED TO SUSTAIN ONLY 50% OF THE PARTNERSHIP EXPENSES.—The Government in this case attempted to show the true net income of the defendant only by computing the gross income of the partnership of Sizer & Myres as shown by bank deposits and supporting bank Recordak copies of the checks covered thereby, and, as well, the expenses of the partnership based on checks drawn by the defendant against the firm account of Sizer & Myres and against his personal account.[14] The difference between the gross income and the expenses so computed was taken by the Government to represent net income of the partnership, and one-half thereof was charged against Myres as his net income for each of the years in question.

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[14] The Government made a half-hearted attempt to utilize the familiar net worth and expenditures approach but for lack of evidence of net worth at the beginning or end of any of the periods involved, as well as duplication of withdrawals from banks and brokerage houses with resultant understatement of apparent income even as compared with the allegations of the Government's indictment, this theory was dropped and no reliance was placed thereon in final argument or instructions to the jury. *Supra,* p. 5.

Thus, Myres was given the benefit of only one-half of the expenses allowed by the Government.

Myres in making his returns, because of absence of a set of partnership books of account, had determined his income from the partnership by using the cancelled checks on the three accounts: the firm account, "Sizer & Myres," and his private accounts, "William J. B. Myres, Trustee", used for only about three months in 1941 (R. 666) and "William J. B. Myres" in the Gillioz Bank & Trust Company of Monett and each of which included deposits of firm receipts and disbursements of firm advances or expenses (R. 171, 172, 544, 911, 922, 1065, 1095, 1097, and 1269). These checks were all identified, except for a few, either as to case or the proper office expense segregation (R. 1310). He also had and used the case files with respect to each case settled (R. 952), including a sheet in the file in each case showing the expenses (R. 516), and a file showing miscellaneous general expenses of the partnership (R. 1125, 1126). Since he was on the "completed contract basis" (Regs. 111, sec. 29.42-4(d)) he deducted all expenses attributable to a particular case in the year that income was received from payment of judgment or settling of the case to which they were attributable (R. 1236, 1323). Petitioner filed no partnership return, continuing a practice adopted on advice of revenue agents in Springfield, Missouri, participating only in certain cases (R. 921). In preparing his return each year he set up each settlement and fee check received by the firm. From this he deducted total sums paid clients and amounts to hospitals and other attorneys, advanced out of the firm account as shown by checks (R. 1126). He then determined what part of the balance was his, having regard for the application of the 40% or

the 50% provision (R. 1127).[15] From the total he next deducted the expense of the firm which he had paid from his personal account and for which he had not been reimbursed from the firm account, including salary and expenses of Sweeney, his assistant, whom he furnished with a car (R. 1127). It was the remainder that he showed on each of his tax returns as Total Receipts (R. 89, 131, 143, 169). Thus, he did not report the gross amount of settlements of the subtracted expenses but showed merely the resultant as gross fees (R. 89, 1124, 1236). Next on the return, by schedule, he showed another item, the miscellaneous expenses of the office of which he had borne only half, such as printing, utilities, etc., as well as the traveling expenses[16] shown by case files in cases settled in the year being reported. He deducted half as his share (R. 89, 91, 131, 133, 143, 149, 1131).[17] He also deducted his personal deductions and credits authorized by law (R. 1131, 1132). The balance was reported as his net income.

(a) *The instruction in the trial court with respect to the defendant's basis of accounting so misrepresented his contention as to render it ridiculous and deprive him of a fair trial.*—Petitioner, to sustain the propriety of the net income shown in his returns, adopted essentially the same pro-

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[15] In 1941 gross settlements in a total of more than $83,000 were subject to the 60-40 division (Def'ts Ex. 3002, R. 1239-1241). The Government made no attempt to allocate only 40% of the fees or to determine when the partnership was employed in many of the cases (Gov't Ex. 214, R. 633, 824, 247).

[16] Certain of the travel expense, including the 3-cents per mile reimbursement to Myres, was included in firm expenses shown as deduction on the returns, with the result that only one-half thereof was taken by Myres (R. 1128).

[17] For 1944 it appears that he either forgot to deduct the expense or took half of each of the actual expense items in listing it in his schedule (R. 169).

cedure used in preparing his returns, although such procedure does not clearly appear on the face of the returns. He introduced evidence prepared from his available written data by his accountants which showed the following: amount received on settlement, amount paid client, amount paid other attorneys, medical expenses paid, and amounts advanced from the firm checking account. The resulting gross return was allocable to each of the two partners as his share in the fees (Deft.'s Ex. 3002, R. 1239-1241) for 1941; (Deft.'s Ex. 3004, p. 1, R. 1251-1253) for 1942; Deft.'s Ex. 3005, p. 1, R. 1258) for 1943; and (Deft.'s Ex. 3006, p. 1, R. 1264) for 1944 (R. 1274-1275)).

With respect to each year there was also an exhibit showing the amount of advancements personally made by Myres on each of the cases settled in that year. (Deft.'s Ex. 3003, R. 1245-1257, 1243; Deft.'s Ex. 3004, p. 2, R. 1253, 1255; Deft.'s Ex. 3005, p. 2, R. 1259, 1258; Deft.'s Ex. 3006, p. 2, R. 1265, 1262.) Thus, Myres' evidence showed that he was entitled, as he testified, not to 50% of the net income of the partnership but to 50% of the gross fees, less a total deduction composed of 50% of the expenses paid from the firm account and 100% of the expenses paid from his personal account (R. 960).

Both courts recognized that the question whether Myres was entitled to take deduction equal to 100% of the expense items paid from his personal account was pivotal in the case (R. 1324-1325, 1419, 1449). Much of the figures evolved from the elaborate exhibits and involved technical accounting testimony were undigested and unsummarized, so that even the United States Attorney admitted (R. 1400) "I don't understand them, that is a good enough reason, and I don't think anyone else does." Instruction to the jury as to the precise nature of the theory of the defense as to the claim of deductions was, therefore, imperative to preservation of even the form of a fair trial.

The court instructed at length and in grave error on this point (R. 1419-1421). It represented to the jury that Myres was contending for a right to deduct 100% of all the expenses of the partnership (R. 419-420).

The evidence was conclusive that petitioner made no claim of deduction for expenses paid from Mr. Sizer's personal account (R. 1959), that he claimed as deductions only 50% of the expenses paid from the Sizer & Myres partnership account (R. 960) and that he claimed 100% deduction only as to those expenses of the firm which he personally paid by checks drawn on his personal bank account (R. 960, 1295, 1296).

The court's instruction made defendant's contention appear so fantastic as completely to mislead the jury and deprive petitioner of fair consideration of the theory of his defense.

This court has ruled that in comment, the trial court may neither distort nor add to the evidence, nor may he so express his comments as to mislead or present theories not warranted by the evidence. *Quercia* v. *United States,* 289 U. S. 466, 470; *United States* v. *Breitling,* 20 How. 252; *Dolan* v. *United States,* 123 Fed. 52 (C. C. A. 9, 1903); *Pincolini* v. *United States,* 295 Fed. 468 (C. C. A. 9, 1923). The evidence in an income tax case of this character must at best be difficult of comprehension by the ordinary juror. Here even the United States Attorney admitted he did not understand it. Complete comprehension by every juror cannot be guaranteed. But it seems obvious that if even the semblance of a fair trial is to be preserved in such cases, no countenance can be given to an instruction such as this which tends to make frivolous on its face the contention of the defendant. Here the point involved was, as stated by both the courts, the most important question in the case.

(b) *In upholding, despite positive evidence to the contrary, instruction to the jury that from a 50-50 partnership an equal sharing of expenses was to be presumed in law, the decision of the court below is in conflict with the decisions of this court and deprives petitioner of his liberty without due process.*—The trial court instructed (R. 1419):

> "*In law* when men, engaged in business, enter into a partnership on a 60-40 basis or a 50-50 basis, and that is the only arrangement between them, then *they are presumed* to have agreed to share the profits and losses of such business partnership equally. Mr. Myres said his only arrangements with Mr. Sizer was that they entered into a 50-50 partnership. He does not state that there was any agreement between him and Mr. Sizer that he, Mr. Myres, was to stand all expenses of the maintenance of his law partnership out of his fifty percent share.[18] From the arrangement and agreement stated by him *the presumption is to the contrary.*" (Emphasis supplied.)

Exception to this instruction was addressed to the point that the presumption had been met by evidence submitted on behalf of defendant (R. 1427). Defendant had testified that where he, out of his own bank account paid for depositions, doctor bills, hospital bills or other expenses, he bore the expense and did not get reimbursement from the client or Mr. Sizer (R. 929, 959, 1127-1128). As pointed out above, p. 12, n. 5, the evidence to the contrary was weak and limited to only 5 cases.

The appellate court sustained the instruction on the ground that defendant's contention "has certain inherent improbabilities which a court and jury are not compelled to ignore" (R. 1457).

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[18] But Myres did testify that as to all of the expenses paid out of his own bank account, he was to bear 100%. "That was my agreement with Mr. Sizer." (R. 959).

The ruling of the appellate court confuses a mere permissible inference with a presumption which the jury was told existed as a matter of law. We do not question that the stated agreement of 50-50 partnership might, with all the other evidence in the case, be considered as evidence by the jury in determining the fact of the right to the 100% deduction. As a mere inference drawn by the ordinary reasoning powers and without the aid of any artificial rule of law, it was a permissible deduction that could be urged upon the jury only in an advisory manner. Jones, Evidence (3d ed.) sec. 10, p. 13.

The error lies in the fact that the permissible inference was stated by the trial court to be a presumption of law. It said (R. 1419):

> "*In law* • • • they are *presumed* to have agreed to share the profits and losses of such business partnership equally."

and reiterated (R. 1419):

> "the *presumption* is to the contrary." (Emphasis supplied.)

The court of appeals decision overlooks the fact that a presumption as such can stand only while it is compatible with the conduct of those to whom it may be sought to apply it, and it must give place and disappear when in conflict with positive evidence to the contrary. *Fresh* v. *Gilson,* 16 Pet. 327, 331; *Lincoln* v. *French,* 105 U. S. 614, 617; *Heine* v. *United States,* 135 F. 2d 914, 917 (C. C. A. 6, 1943); *Passantino* v. *United States,* 32 F. 2d 116, 118 (C. C. A. 8, 1929, other judges); *Ezzard* v. *United States,* 7 F. 2d 808 (C. C. A. 8, 1925).

> "It never had and cannot acquire the attribute of evidence. • • • Its only office is to control the result where there is an entire lack of competent evidence."

Where, as here, the defendant alone adduces evidence which tends to support the theory of the defense, the case must be decided on that evidence. *Del Vecchio* v. *Bowers*, 296 U. S. 280, 286. Here the defendant introduced clear and uncontradicted evidence that of partnership expenses paid by check from his own account, except for reimbursements shown by Sizer & Myres checks, he did bear them without reimbursement (R. 921, 939, 941, 956-959, 1128, 1223, 1227). The equity of this was explained by the petitioner when he testified that expenses so paid by him were generally offset by the expenses paid by Sizer from his personal account (R. 959). Indeed, though probatively no stronger than as to the other expenses so paid, the evidence that petitioner bore Sweeney's expenses was expressly recognized by the court not only as destroying the presumption, but as so conclusive as to override even the permissibility of a contrary inference (R. 1428). Thus, despite the positive showing that expenses of partnership were not borne 50-50 and the entire absence of evidence that they were, the jury was directed that a presumption to the contrary still obtained as a matter of law.

This was plain error. As stated in Thayer, Preliminary Treatise on Evidence at the Common Law, p. 346, presumptions are—

> "*prima facie* precepts; and they presuppose only certain specific and expressed fact. The addition of other facts, if they be such as have evidential bearing, may make the presumption inapplicable. All is then turned into an ordinary question of evidence, and the two or three general facts presupposed in the rule of presumption take their place with the rest, and operate, with their own natural force, as a part of the total mass of probative matter. Of course the considerations which have made these two or three facts the subject of a rule of presumption may still operate, or may not, to emphasize their quality as evidence; but the main point

to observe is that the rule of presumption has vanished."

See also 9 Wigmore on Evidence (3d ed.) sec. 2491, p. 290. The presumption is not evidence and ceases upon the introduction of substantial proof to the contrary, it may not be given weight as evidence. *New York Life Insurance Co.* v. *Gamer,* 303 U. S. 161, 170, 171.

Conflict is clear. Where the presumption has been destroyed by evidence, instruction to the jury that there is a presumption in law can serve only to impress on the jury that some artificial probative weight is to be given to a merely permissible inference. Such instruction is highly prejudicial and reversible error even in civil cases. *New York Life Insurance Co.* v. *Gamer,* 303 U. S. 161, 166, 171; *Jefferson Standard Life Insurance Co.* v. *Clemmer,* 79 F. 2d, 724, 730-731 (C. C. A. 4, 1935); *Equitable Life Assurance Soc.* v. *MacDonald,* 96 F. 2d 437, 439 (C. C. A. 9, 1938) cert. denied 305 U. S. 624; *Reliance Life Insurance Co.* v. *Burgess,* 112 F. 2d 234, 238 (C. C. A. 8, 1940), cert. denied 311 U. S. 699.

Here the instruction gave continuing effect and artificial evidential weight to a destroyed presumption on the pivotal question whether petitioner was required to bear 100% or 50% of partnership expenses paid from his personal account (R. 1419, 1949). It is a remarkable commentary on our judicial system to find a court of appeals less willing than in a civil case to protect a defendant in a criminal trial against erroneous and prejudicial weighting of the evidence. The resultant prejudice requires reversal. *McCandless* v. *United States,* 298 U. S. 342, 347-348; *Bihn* v. *United States,* 328 U. S. 633, 638.

5. The Improper Conduct of the Prosecuting Attorneys Clearly Violated the Right of Petitioner to a Fair and Impartial Trial.—The calculating and continued practice of the prosecuting attorneys throughout the trial wrong-

fully by innuendo and otherwise to prejudice the cause of petitioner by introducing irrelevant issues and to appeal to the passion and prejudice of the jury, violated the right of petitioner to fair and impartial trial.

(a) *The trial throughout was marked by continued shabby efforts, all part of an obvious single design, by the Assistant United States Attorney to convict petitioner by innuendo and by direct accusation of having been guilty of "cheating his dying partner."*—In the midst of his opening argument to the jury, Assistant United States Attorney Murphy referred to a $17,500 settlement made by the defendant in June 1944 (R. 977) six months before Sizer's death December 30, 1944 (R. 1137), and told the jury (R. 1377):

> "I have an analysis here and I am going to tell you where the cash went. I am going to show you that the defendant was cheating his dying partner."

The court of appeals concedes that "the statement of counsel should not have been made" but holds that direction of the trial court that the statement be disregarded (R. 1377) prevented prejudicial error (R. 1459).

The court of appeals not only fails to note the particularly prejudicial effect of the attorney's reference to "analysis"; it overlooks as well that this statement was merely the final bloom of a set and fruitful purpose, apparent throughout the trial, without any supporting evidence, to create in the jury a belief that defendant had been guilty of cheating his own partner, a cheat aggravated by the fact that that older partner was dying.

The first indication of the purpose and design of the Government prosecution appears early in the trial. Over the objection of petitioner, the Government introduced the testimony of one Clara Triplett, a practical nurse, to show that about September 1, 1943, Sizer had a heart attack

and thereafter was disabled from looking after his business for appreciable periods during each month (R. 456-458). Objection was overruled, after which Assistant United States Attorney Murphy said: "We'll connect it up" (R. 457).

The design next crops out in connection with the McElroy settlement draft for $17,500 deposited by defendant in the Gillioz Bank for collection only [19] (Gov't. Ex. 120, R. 243). Government Counsel Murphy made an attempt through Revenue Agent Starr to show that the petitioner diverted the firm's share of the draft to his own uses, but this collapsed when it appeared that the records relied upon by Murphy related to items not shown to have any relation in date or otherwise to this draft collection item [20] (R. 452, 783).

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[19] Petitioner had earlier explained to the agents in his sworn statement taken at Kansas City and in the trial that he had not put this draft through his regular checking account with that bank because in the settlement with the client which took place at Springfield, Missouri, where the draft was received, he had given the client four checks (R. 937, 977) and these had been written at the client's request, using universal or hotel check blanks (R. 977), and petitioner had made no record of the amount of one (R. 977, 978). On his return to Monett, June 23 he deposited the $17,500 draft for collection only, directing that the four checks to the client be paid out of it (R. 987) only because he had forgotten the exact amount of one of the checks and wished to keep his own checking account correct (R. 937, 987). Government Attorney Murphy sought to rebut this by his own testimony that the bank cashier Willey had testified to the contrary (R. 987). Willey had merely said he didn't remember (R. 550) and he admitted, as the ledger transcription shows (R. 613) that Myres checks to McElroy were not charged against Myres regular account (R. 453).

[20] Some items antedated the July 5, 1944, payment date of the last of the four client checks (Ex. 2174, R. 979) which petitioner had directed to be charged against the $17,500 draft and the first date as of which the bank would have made the remaining proceeds available to petitioner. Antedated items upon which the Government erroneously relied were $1,875.00 in bonds issued June 23 (R. 783) and a cash deposit of $1,125.00 the same day (R. 784). But the endorsements on the $17,500 draft showed that it had not even been paid by the First National Bank in St. Louis until June 26 (R. 243). Another item upon which the Government relied

But this did not deter government counsel. Attempting to shift the burden of proof to petitioner, the United States Attorney furthered the scheme by asking the petitioner if he had introduced a single check to show payment to Sizer of proceeds of 13 specific settlements, including the McElroy one (R. 1165). This, of course, was a simple instance of the age-old trick counsel testifying by innuendo. Part of the same pattern was its repetition in the cross-examination of Cuneo, petitioner's accountant witness (R. 1359-1360):

> "Q. Don't you know as a matter of fact, Mr. Cuneo, that not one penny of that settlement ever reached Mr. Sizer's bank account?
>
> "Mr. Waters: Objection, if the Court please.
>
> "A. I certainly do not.
>
> "Mr. Waters: There is absolutely no evidence to that effect.
>
> "The Court: Overruled.
>
> "A. I do not know that.
>
> "Mr. Murphy: Don't you know, as a matter of fact, Mr. Cuneo, that the defendant pocketed every cent of that $9,000?
>
> "Mr. Waters: We object to that, if the Court please. That is not only argumentative——
>
> "The Court: Sustained."

With all this background of innuendo and no evidence, the Assistant United States Attorney finally gathered the fruits by telling the jury (R. 1377):

> "*I have an analysis here* and I am going to tell you where that cash went. I am going to show that the *defendant was cheating his dying partner.*" (Emphasis supplied.)

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was the deposit of cash made with his broker by petitioner on September 29, 1944 (R. 783). Objection to evidence of the cashier's check for $3,500.00 purchased July 5, 1944, was sustained specifically on the ground that there was no evidence of its connection with the McElroy settlement (R. 783).

As the court of appeals states (R. 1459), the trial court did interject the mild direction that statement of counsel be disregarded (R. 1377). But it is absurd to hold that this wiped out the prejudice in the light of what had gone before, and particularly, what went after. The United States Attorney proceeded immediately and as part of his purported analysis, to detail items relied upon to show the cheat of the dying partner, being the same items he had earlier attempted, unsuccessfully, to show were diversion of the proceeds of the McElroy settlement.[21]

The court thus shut its eyes to a systematic flouting of all the principles that should inhibit the prosecutor from taking unfair advantage of his position. Both Wear, the United States Attorney, and Murphy, his assistant came armed with the unworthy tricks that full four years in their present positions had taught them. And they used them.

(b) *In his closing argument the United States Attorney made most flagrant appeal to the passion and prejudice of the jury.*—That only could have been his purpose; that alone could have been its result. In his peroration the United States Attorney said (R. 1404):

> "I will undertake to say to you now that there wasn't a soldier in our armed forces, a sailor or a marine, that bared his breast to the enemy to protect such men as Myres, to protect our jury system, but what paid more money than William J. B. Myres did."

The court joined in his purpose and overruled objection (R. 1404). The court of appeals attempts to excuse this as

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[21] In doing so he misrepresented the date of notification by the bank of clearance of the McElroy settlement draft as June 23 (R. 1378), whereas that was merely the date of deposit by petitioner (Ex. 120, R. 243, 937, 987) and it did not clear until June 26, 1944 (Ex. 120, R. 243). He again relied (R. 1377) on the $3,500 draft to Uhlman Grain Company dated July 5, 1944, although it had been specifically excluded by the court as without evidence of its connection (R. 783).

"relatively innocuous" by pointing to part of the argument of petitioner's counsel asserting that the prosecutor was using prosecution to bludgeon admission of tax liability (R. 1460). This appeal to the deep emotions of patriotism and respect for members of the armed forces, heightened by the probability that some, at least, of the jurors had children or relatives who so served, could only result in arousing hostility and prejudice on an issue not relevant to the charge. An accused is subject to no penalty or criticism because he pays less tax than another. This was entirely alien to the question of the defendant's guilt of willful attempt to evade the tax and was dragged in solely to wave the flag. When it came in with the approval of the court which overruled objection, the right to a fair trial solely on the charge of the indictment was gravely impaired.

The purpose of the United States Attorney to obtain conviction other than on the charge of the indictment, the evidence, and the applicable law is reflected again the closing words of his argument:

> "As the gentlemen on this side said, the grand jury indictment is no evidence of his guilt, shouldn't be. But the grand jury did its duty when it indicted this man. All of us here have tried to do our duty in presenting [fol. 2176] this case. The Court will do his duty in charging you what the law is about the matter. But you cannot convict people unless petit juries do their duty, and I am confident that you ladies and gentlemen will, by returning a verdict of guilty." (R. 1405.)

The court of appeals opinion does not consider this error, flagrant though it was, because petitioner had not objected thereto (R. 1461). But the appellate court overlooked the fact that four other objections to equally improper remarks by the same attorney in his relatively short closing statement (R. 1396, 1405) had theretofore been overruled (R.

1399, 1404, 1405). Judicial appreciation of the prejudicial effect on defendant's case where objections repeatedly are made and overruled by the court requires recognition that error so great and so prejudicial cannot be overlooked on the ground that no objection was taken. A Federal court is itself charged with securing to the defendant a fair trial; it is not always an answer that petitioner failed to protest. *Brown* v. *Walter*, 62 F. 2d, 798, 799-800 (C.C.A. 2, 1933).

(c) *The purpose of the United States Attorney to obtain conviction, not by fair trial but by foul blows, is again demonstrated in his cross-examination of witnesses who testified as to the reputation of defendant in his community.* —The court of appeals glossed over the nature of the United States Attorney's questions which clearly charged by innuendo that petitioner had been disbarred or suspended in 1934 for embezzlement. The appellate court opinion merely states that Government counsel asked the character witnesses "if they had heard of the defendant's suspension by the Supreme Court of Oklahoma" (R. 1458). The opinion errs: (1) in stating that the questions went only to suspension; (2) in stating that the United States Attorney had a basis for his inquiries; (3) in holding that this was within the discretionary limits of cross-examination of character witnesses.

(1) The questions by innuendo told the jury the petitioner had been disbarred in Oklahoma in 1934 and that such disbarment was on account of embezzlement. The ruling of the court left the jury with the impression that, if not disbarred, petitioner at least had been guilty of embezzlement.

After Government witness Ed Salzer had testified on cross-examination, as to petitioner's reputation for honesty and integrity, the United States Attorney Wear, questioning him on re-direct, asked him (R. 213):

"Did you hear that he had been disbarred for embezzlement in Oklahoma by the Supreme Court?

"Mr. Waters: That is contrary to the fact.

"Mr. Wear: It is not. We have a certified copy."[22]

Petitioner's counsel objected that the matter was too remote to be competent and that the matter was apparently being pursued with intention of showing some record of disbarment, but the objection was overruled on the ground that it had been opened up by question as to hearing of any adverse criticism (R. 213-214).

When the witness was excused, petitioner moved for mistrial which was overruled (R. 214). But after colloquy at the bench, the court said (R. 214):

> "Ladies and gentlemen of the jury, the Court is informed by counsel that there were no disbarment proceedings against the defendant in this case in the state of Oklahoma. As a consequence of that you will disregard the questions and answers in that connection, of the preceding witness. It should not influence you in any respect in arriving at your verdict in this case."

The "certified copy" was, of course never offered in evidence.[23] The impression made on the jury by the United States Attorney's statement that he had a certified copy showing disbarment for embezzlement obviously was not erased from the jury's mind by the court's statement that "there were no disbarment proceedings against the defendant in the case." The impression that there had been embezzlement is not only left unaffected, but, if anything, emphasized by the court's failure to negate that part of the charge.

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[22] Of course, the cold print of the record cannot reflect the dramatic and impressive action of the United States Attorney in turning to his associate counsel as if to take the "certified copy" when he made this statement.

[23] A copy of the opinion of the Supreme Court of Oklahoma in this matter appears in the appendix.

Relying on the same basic erroneous impression so created in the mind of the jury, he brought the matter up again by question addressed to Judge Brown, one of petitioner's character witnesses (R. 1218):

> "Judge, did you *know* on the 30th day of April 1935, that he was suspended by the Supreme Court of Oklahoma ——" (Emphasis supplied)

Objection was sustained on the ground of remoteness but the court refused request for direction to the attorney not to ask the question again (R. 1219).

Examining petitioner's character witness, Judge Watson, he asked (R. 1222):

> "Mr. Wear: You *knew* then he was suspended by the Supreme Court of the State of Oklahoma on the 30th day of April 1935, and suspended for one year for embezzling money from his client?" (Emphasis supplied)

Over objection, upon withdrawal of the word "know," the question was allowed and motion for withdrawal denied (R. 1222).

It is thus plain that, contrary to the court of appeals' statement, the questions went not merely to suspension. Their main import was that a charge against defendant of embezzlement had been sustained by the Oklahoma court. The affirmance thus approves introduction in evidence by innuendo of the assumed fact, not the rumor, of a charge and conviction of another crime.

(2) Contrary to the court of appeals' statement, there was no basis for innuendo of an accusation of embezzlement to be found in a charge of "receiving money of his client which he failed, neglected, and refused to pay over" (R. 1458; see Appendix, p. 58). Embezzlement is a definite crime. The difference is clear, and the seriousness of the charge of crime so made is too great to be thus lightly

condoned. Surely petitioner, although he is merely a country town lawyer, is entitled to no less consideration than those who make vociferous and clamorous claim of violation of civil rights.

(3) Nothing in *Michelson* v. *United States,* 335 U. S. 469, or any other case recognizes the propriety of this cross-examination.

Here the question addressed to the first witness was improper in referring the charge as "embezzlement." The purpose to introduce an erroneous impression on the jury of prior crime based only on counsel's imagination is further evidenced by his statement "We have a certified copy" (R. 1213). The next witness was questioned with "know" (R. 1218), a practice never allowed. *Michelson* v. *United States,* 335 U. S. 469, 482, note 19; *Stewart* v. *United States,* 104 F. 2d 234, 235 (App. D. C., 1939). And of the third witness the question was again (R. 1222): "You knew * * *." It requires a high degree of naivete to believe that this repeated conduct of counsel, despite partially sustained objections, did not have its intended effect. The error and prejudice is well-recognized. *Filippelli* v. *United States,* 6 F. 2d 121, 123 (C.C.A. 9, 1925); *Little* v. *United States,* 93 F. 2d 401, 408 (C. C. A. 8, 1937) cert. denied 303 U. S. 644; *Sloan* v. *United States,* 31 F. 2d 902, 906 (C. C. A. 8, 1929).

The record here shows studied effort to inject into the case irrelevant and prejudicial matter for the purpose of influencing the verdict, and its continued repetition after adverse rulings. This was design, not inadvertence, and improper purpose its only explanation. The cumulative effect cannot be disregarded as inconsequential. *Berger* v. *United States,* 295 U. S. 78, 88-89; *Hall* v. *United States,* 150 U. S. 76, 81; *Nations* v. *United States,* 32 F. 2d 598, 600 (C. C. A. 8, 1929) cert. denied 273 U. S. 735; *Volkmor* v.

United States, 13 F. 2d 594, 595 (C. C. A. 6, 1926); *Pierce* v. *United States,* 86 F. 2d 949, 952 (C. C. A. 6, 1936).

In substance, the court below sought to minimize the conduct of the prosecutor as not constituting reversible error. But as was said in *Miller* v. *Territory of Oklahoma,* 149 Fed. 331 (C. C. A. 8, 1906):

> "The zeal, unrestrained by legal barriers, of some presecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberation of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty."

This rule was quoted and applied in *Coulston* v. *United States.* 51 F. 2d 178, 182 (C. C. A. 10, 1931) and *Singer* v. *United States,* 58 F. 2d 74, 77 (C. C. A. 3, 1932). And it is peculiarly applicable to the instant case. Where a case is as weak and doubtful as this, the prejudice to the defendant is so highly probable that its non-existence cannot be assumed. *Berger* v. *United States,* 295 U. S. 78, 89.

Conclusion

Petitioner has been deprived of a fair trial.

The instruction to the jury that petitioner has been required by law to produce and make available his records on

mere request of internal revenue officers misstated the law and by the instruction that it was evidence of willfulness, in effect imposed a penalty for the breach of the alleged duty without petitioner's having ever had a hearing on the question. The conflict with the decision of the court in *Spier* v. *United States*, 317 U. S. 392 is clear. On the crucial point of the case—right to deduct 100% of partnership expenses personally paid—a so-called presumption of law was given effect as evidence of his reimbursement for 50% thereof as against petitioner's overwhelming showing that he was never reimbursed. The record is clear that petitioner on two distinct matters heavily relied on by the Government was deprived of his clear right to have the jury instructed on his defensive theory of good faith. Aggravating the highly prejudicial instructions was the improper and intentionally prejudicial conduct of the prosecution.

Unless the supervisory power of this Court is exercised, vital errors which have always been corrected in mere civil cases will have been permitted to destroy his basic rights.

WHEREFORE, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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AUGUST, 1949.

APPENDIX

Title 26, U. S. C.:

Sec. 54(a). Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

Sec. 145(a). Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b). Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c). Any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be sub-

ject to the penalties prescribed for perjury in section 125 of the Criminal Code.

Sec. 3614(a). The Commissioner for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

Sec. 3615(e). Whenever any person summoned under this section neglects or refuses to obey such summons, or to give testimony, or to answer interrogatories as required, the collector may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

* * * * * * *

Sec. 3633(a). If any person is summoned under the internal revenue laws to appear, to testify or to pro-

duce books, papers, or other data, the District Court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

Regulations 111:

Sec. 29.41-3. Method of Accounting—It is recognized that no uniform method of accounting can be prescribed for all taxpayers, and the law contemplates that each taxpayer shall adopt such forms and systems of accounting as are in his judgment best suited to his purpose. Each taxpayer is required by law to make a return of his true income. He must, therefore, maintain such accounting records as will enable him to do so.

Sec. 29.54-1. Every person subject to the tax, except persons whose gross income (1) consists solely of salary, wages, or similar compensation for personal services rendered, or, (2) arises solely from the business of growing and selling products of the soil, shall *for the purpose of enabling the Commissioner to determine the correct amount of income subject* to the tax, *keep such permanent books of account or records,* including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters *required to be shown* in any return under Chapter 1. Such books or records shall be kept at all times *available for inspection* by internal revenue officers, and shall be retained so long as the contents thereof may become material in the administration of any internal revenue law.

SUPREME COURT OF OKLAHOMA

No. 24081

IN RE MYRES

July 10, 1934

Rehearing Denied Dec. 11, 1934

Second Petition for Rehearing Denied April 30, 1935

1. Attorney and client—53(1):

In proceeding to discipline attorney, advisory recommendations of board of governors of state bar will be presumed, in first instance, to be just, but may be approved by Supreme Court in such modified form as is deemed proper.

2. Attorney and client—58:

Evidence regarding attorney's failure to pay over money collected for client *held* to authorize suspension of attorney from practice of law for one year.

Syllabus by the Court

In a proceeding to disbar or discipline a member of the bar for professional misconduct, where the record supports the findings of the board of governors of the State Bar, the advisory recommendations of said board will be presumed, in the first instance, to be just and proper, but may be approved by this court in such modified form as is deemed proper.

Proceeding in the matter of the discipline of Wm. J. B. Myres, a member of the bar. On review of the findings and advisory recommendation of the Board of Governors of the State Bar.

Findings and recommendations approved, and respondent suspended from the practice of law for one year.

C. B. Stuart and E. J. Doerner, both of Tulsa, for appellant.

Geo. C. Abernathy, of Shawnee, Legal Counsel of the State Bar of Oklahoma.

WELCH, *Justice:*

This is a proceeding to review the findings and an order of recommendation of the board of governors of the State Bar of Oklahoma that respondent, Wm. J. B. Myres, be suspended from the practice of law for a period of three years.

The respondent was charged with receiving money of his client which he failed, neglected, and refused to pay over.

(1, 2) His client was a woman engaged in the mercantile business. His employment finally extended over many months, during which time he served her in the defense of suits brought by creditors in extended efforts to compromise with creditors, and in bankruptcy. He also collected open accounts for her both before and after bankruptcy. On many occasions money transactions and transfers were had between him and his client. He was tardy in reporting and remitting sums collected, and in the payment of checks which were not payable at the bank when he gave them to his client, and was far from prompt in furnishing his client a requested final accounting.

When respondent did comply with the demands of his client and furnish a statement of all sums collected by him he made charges for services which exceeded the balance remaining in his hands by several hundred dollars. These fee charges were greatly in excess of his former agreement with his client as to what the fee would be for certain services. There was much dispute between the respondent and his client as to what agreements were had as to the fees to be charged, and as to what services were contemplated to be rendered in the beginning. There was also direct conflict in many instances between respondent and his client as to transactions between them in cash or currency, and as to checks of respondent not paid when presented. Before bankruptcy respondent agreed to collect open accounts for 25 per cent. After bankruptcy, he proceeded with these accounts, assuming to charge them a fee of 50 per cent.

There was a question as to whether certain accounts were collected before or after bankruptcy.

After an extended hearing as shown by a voluminous record, the examining committee and, on review, the board of bar governors found the various issues against respondent, and found him guilty of the charges preferred against him. There was a finding that, when the employment was about to terminate, and when respondent did furnish his client a statement of sums collected, respondent raised the fee charges to sums not authorized, for the purpose of thereby excusing his former failure to pay over money belonging to his client, and for the further purpose of thereby consuming the balance that otherwise would have remained due the client.

All of these findings against the respondent are sustained by competent evidence. The rule is that such findings will not be reversed unless against the clear weight of the evidence. In re Tillman, 157 Okl. 166, 11 P. (2d) 511; In re Purdy, 166 Okl. 31, 25 P. (2d) 1096.

It is not necessary to treat the facts in more minute detail. The respondent by prompt and proper conduct could and should have paid his client her money, and kept her advised as to the progress of her affairs intrusted to him. He could have avoided every dispute which later developed with his client by diligence, prudence, and fidelity to his client. We must conclude from the record that the respondent in his dealings with his client fell far short of rendering that character of service and strict fidelity to his client in the matter of her money which is required in such a relationship. Her financial difficulties all but forced her to place implicit reliance upon some legal counsel. She chose the respondent, and was entitled to rely upon him as a member of the bar of this state, not only to serve her interest, but to promptly and faithfully account to her for her money. His belated report of collected funds, balanced by unauthorized fee charges, cannot be accepted as a discharge of his duty in the many instances shown by the record, beyond question, require disciplinary action.

The authorities of the State Bar evidently concluded that this respondent was a man of promise, and that a suspension

from the practice of law for a definite period of time would meet the necessities of the case and more nearly serve the proper purpose. In view of the determination of other bar cases, and after careful consideration of the record here, we approve that conclusion, but it is the view of the court that the suspension for three years as recommended may in this case be properly reduced to a suspension for one year.

The respondent in his petition for review here urges that the findings of the board of governors are not sustained by the evidence, and are wholly against the weight of the evidence. These conditions are not borne out by the record. Quite the contrary appears.

The findings and recommendations of the board of bar governors are approved, with modification of the term of suspension, and the respondent, Wm. J. B. Myres, is suspended from the practice of law for one year from the date this opinion becomes final.

Riley, C. J.; Cullison, V. C. J., and Swindall, McNeill, Osborn, and Busby, JJ., concur.

Andrews and Bayless, JJ., absent.